

² 5 U.S.C. § 8101 *et seq.*

(2) whether OWCP properly determined that appellant was at fault in the creation of the overpayment of compensation, thereby precluding waiver of recovery of the overpayment; and (3) whether OWCP properly required repayment of the overpayment by deducting \$250.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On February 9, 2009 appellant, then a 52-year-old letter carrier, sustained injury to her left knee when she twisted it when exiting her postal vehicle at work. OWCP initially accepted that she sustained a tear of the medial meniscus (posterior horn) of her left knee, and it later expanded the accepted conditions to include degenerative joint disease of her left knee.

Appellant did not stop work around the time of her February 9, 2009 employment injury, but stopped work on November 24, 2009 to undergo OWCP-approved partial medial meniscectomy and chondroplasty on her left knee.

Appellant returned to limited-duty work on April 26, 2014 and received partial disability compensation.³

Appellant stopped work on January 6, 2016 to undergo an OWCP-approved left knee total replacement on that date and she received wage-loss compensation on the periodic rolls beginning April 19, 2016.

In an April 19, 2016 letter, OWCP informed appellant that, beginning on that date, she started receiving total disability compensation on the periodic rolls every 28 days. It advised her that, to minimize the possibility of an overpayment of compensation, she must notify OWCP immediately when she went back to work. OWCP informed appellant that, if she worked for any portion of the period for which she received compensation, she must return the payment even if she had already advised OWCP that she was working.⁴

In a November 3, 2016 report, Dr. Michael N. Fehm, an attending Board-certified orthopedic surgeon, indicated that appellant was released from his care with respect to her left knee condition as of November 10, 2016, at which time she could resume work.

The evidence of record contains payment records showing that appellant received \$1,649.64 in disability compensation for the period November 10 to December 10, 2016. On November 12, 2016 appellant received a \$1,490.00 EFT deposit to her bank account covering the period October 16 to November 12, 2016 and that, on December 10, 2016, she received a \$1,490.00 EFT deposit covering the period November 13 to December 10, 2016. The payment

³ Appellant experienced other instances of work stoppage and return to light-duty work between November 2009 and April 2014. Some of these work stoppages were due to a work-related right foot condition (OWCP File No. xxxxxx049) which is unrelated to the February 9, 2009 work injury.

⁴ OWCP advised appellant that, for payments sent by electronic fund transfer (EFT), a notification of the date and amount of payment appears on the statement from her financial institution and that she was expected to monitor her EFT deposits carefully, at least every two weeks. It informed appellant that, if she worked for any portion of the period for which a deposit was made, she must advise OWCP immediately.

record for the November 12 and December 10, 2016 payments contain the notation, “Claimant released to [return to work] November 10, 2016, started a new claim [assigned OWCP File No. xxxxxx049] effective November 11, 2016, no longer claiming compensation under this claim.”

The record contains a document memorializing a December 13, 2016 telephone call during which appellant advised an OWCP official that she had been released to work for four hours per day and that she was now claiming compensation under a new separate claim (OWCP File No. xxxxxx049). On December 22, 2016 she advised another OWCP official by telephone that her claim for compensation under OWCP File No. xxxxxx049 started on November 11, 2016.

In a January 12, 2017 notice, OWCP advised appellant of its preliminary determination that she received a \$1,649.64 overpayment of compensation for the period November 10 to December 10, 2016 because she received total disability compensation for this period after she returned to full-time work on November 10, 2016. It also made a preliminary determination that she was at fault in the creation of the overpayment because she was aware or should have reasonably been aware that she was not entitled to receive wage-loss compensation benefits after returning to full-time work.⁵ OWCP advised appellant that she could submit evidence challenging the fact, amount, or finding of fault, and request waiver of recovery of the overpayment. It informed appellant that she could submit additional evidence in writing, during a teleconference with its district office, or at a prerecoupment hearing with its Branch of Hearings and Review, but that a teleconference or prerecoupment hearing must be requested within 30 days of the date of the written notice of overpayment. OWCP requested that appellant complete and return an enclosed Overpayment Recovery Questionnaire (Form OWCP-20) within 30 days even if she was not requesting waiver of the overpayment.

Appellant submitted a Form OWCP-20, signed on January 31, 2017, in which she provided figures for monthly income, monthly expenses, and assets. She claimed that the \$1,649.64 overpayment was improper because she believed that an overpayment was not created for three of the days during the claimed period of the overpayment, *i.e.*, November 10 to December 10, 2016.⁶ Appellant further expressed her belief that she was not at fault in the creation of the \$1,649.64 overpayment and requested waiver of recovery of the overpayment.⁷ She requested a teleconference with OWCP’s district office.

During the teleconference held on March 24, 2017, appellant asserted that the amount of the claimed \$1,649.64 overpayment was improper. She claimed that the overpayment should not include the dates November 10 to 13, 2016 because she was off work on those dates due to

⁵ OWCP discussed its April 19, 2016 letter which advised appellant that she could not accept a total disability compensation payment for any period after her return to full-time work.

⁶ Appellant did not identify the particular days she felt should not have been included in the overpayment calculation.

⁷ Appellant asserted that she advised OWCP of her return to work by submitting a medical report produced around that time which discussed her ability to return to work. She claimed that OWCP had plenty of time to stop the payments which created the \$1,649.64 overpayment.

November 11, 2016 surgery related to a right foot condition developed under a separate claim (OWCP File No. xxxxxx049). OWCP's claims examiner indicated that she would research OWCP File No. xxxxxx049 and determine whether the dates covered by the overpayment in the current case were accurate. Appellant further argued she was not at fault in the creation of the \$1,649.64 overpayment. She asserted that OWCP had time to stop any improper payment after she advised it of her return to work.

In an April 28, 2017 decision, OWCP determined that appellant received an overpayment of compensation in the amount of \$1,649.64. It found that she was at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment. OWCP indicated that it had considered the submitted financial information and determined that appellant would repay the overpayment through deductions of \$250.00 every 28 days from her continuing compensation payments.⁸

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.⁹ Section 8129(a) of FECA provides, in pertinent part, that when an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.¹⁰

Section 8116 of FECA defines the limitations on the right to receive compensation benefits. This section of FECA provides that, while an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States, except in limited circumstances.¹¹ Section 10.500 of OWCP's regulations provides that compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury.¹²

ANALYSIS -- ISSUE 1

The evidence of record shows that appellant returned to work for the employing establishment at some point in November 2016, but she continued receiving total disability

⁸ At the time of OWCP's April 28, 2017 decision, appellant was not receiving FECA wage-loss compensation benefits in connection with her left knee injury (OWCP File No. xxxxxx922), but OWCP suggested that she was receiving FECA wage-loss compensation benefits in connection with her right foot injury (OWCP File No. xxxxxx049).

⁹ 5 U.S.C. § 8102(a).

¹⁰ *Id.* at § 8129(a).

¹¹ *Id.* at § 8116(a). The Board has held that a claimant is not entitled to receive temporary total disability and actual earnings for the same period. *See M.S.*, Docket No. 16-0289 (issued April 21, 2016).

¹² 20 C.F.R. § 10.500(a).

compensation after her return to work. The record contains OWCP payment records showing that appellant received total disability compensation throughout November 2016 and up until December 10, 2016. However, appellant would not be entitled to receive total disability compensation after she returned to work for the employing establishment and was being paid wages for that work.¹³ For these reasons, the Board finds that OWCP properly found that appellant received an overpayment of compensation.

The Board further finds the amount of the overpayment of compensation is not in posture. During the teleconference held on March 24, 2017, appellant asserted that the amount of the claimed \$1,649.64 overpayment was improper. She claimed that the overpayment should not include the dates November 10 to 13, 2016 because she was off work on these dates due to November 11, 2016 surgery related to a right foot condition developed under a separate claim (OWCP File No. xxxxxx049).¹⁴ Without the above-noted information, the Board is unable to make a reasoned determination regarding the amount of the overpayment, *i.e.*, the overpayment created by a prohibited dual payment.¹⁵

The Board finds that the case shall be remanded to OWCP for determination of the amount of the overpayment.¹⁶ Given the Board's finding regarding the first issue of the present case, it is premature for it to consider the second and third issues of the present case. After determining the amount of the overpayment, OWCP shall develop the matters of fault, waiver, and method of recovery. After carrying out this development, OWCP shall issue a *de novo* decision regarding these overpayment matters.

CONCLUSION

The Board finds that appellant received an overpayment of compensation. However, the amount of the overpayment is not in posture. The case is remanded to OWCP for further development with respect to amount of overpayment, fault, waiver, and method of recovery.

¹³ See *supra* notes 11 and 12.

¹⁴ OWCP's claims examiner conducting the March 24, 2017 teleconference indicated that she would research appellant's right foot injury claim (OWCP File No. xxxxxx049) and determine whether the dates covered by the overpayment in the current case were accurate. The Board notes that there is no indication in the record that the OWCP claims examiner carried out such research.

¹⁵ See *supra* notes 11 and 12.

¹⁶ In carrying out this development, OWCP should make reference to appellant's separate claim for a right foot injury (OWCP File No. xxxxxx049).

ORDER

IT IS HEREBY ORDERED THAT the April 28, 2017 decision of the Office of Workers' Compensation Programs is affirmed in part and is set aside in part. The case is remanded to OWCP for further action consistent with this decision.

Issued: September 22, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board